Supreme Court, U.S.
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# 92-468

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1992

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D.C. PERRY, Petitioner,

vs.

EASTMAN KODAK COMPANY, Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

A. Whether the fact that losses are involuntary should block recovery for insider or tippee trading, or Sec 9 manipulation.

B. Whether the fact plaintiffs are not opposite side traders should block recovery for insider or tippee trading, or Sec 9 manipulation.

C. What time and other parameters exist in defining "contemporaneous" trading, in fraud on the market and other securities claims.

## PARTIES

See caption for all parties.

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App A (7 Cir Order), B (Dis Ct Order, C (Sec 78 i and j)


## TABLE OF AUTHORITIES


Affiliated Ute vs. U.S. 406 U.S. at 153

Basic, Inc. vs. Levinson, 485 U.S. 224

Frankel vs. Wyllie & Thornhill, Inc., 537 F Supp 730

Fogarty, "Basis of Insider Trading Law", Ohio St L J 353, (1988)

Loss, Louis, Fundamentals of Securities Regulation, (1988)

## REPORTS OF OPINIONS

The District Court opinion petitioner believes was not reported. The 7th Circuit judgement was without an opinion.

## JURISDICTION

The 7th Circuit judgement occurred May 15, 1992. There was no petition for rehearing. Jurisdiction for certiorari is based on 28 U.S.C. 41 and 1254.

## STATUTES INVOLVED IN THE CASE

15 U.S. Code Sec. 78j (b), and 78i, Sections 10b and 9 of the 1934 Securities Exchange Act. See appendix.

## STATEMENT OF THE CASE

As early as 1983, Eastman Kodak Company ("Kodak") showed an interest in the drug ribavirin, and its owners, ICN

Pharmaceuticals, Inc, its subsidiary Viratek, Inc, ("Viratek") and affiliates. In 1984, Kodak purchased 470,000 shares of ICN stock and 700,000 shares of Viratek, placed a director on the boards of both corporations, and beginning in 1985, financed a $45,000,000 6 year joint venture, NARI, focusing extensively on possible uses of ribavirin, including as a cure for Aids.

Four of the governors of NARI were high ranking Kodak officials, and four ICN, including Milan Panic, now a high ranking Serbian (or Yugoslav) government official. A post governors' meeting report December 19, 1985 focused the attempts of ICN to gain FDA approval of ribavirin for Aids treatment, and 1986 reports to the governors addressed testing of ribavirin for aids type viruses. A Kodak vice president became president of Viratek and a vice

president of ICN in August, 1986. This was reported as a move to strengthen Kodak's control of ICN, and fueled takeover rumors.

NARI's formal objectives included modification of ribavirin to cross the blood brain barrier, necessary for Aids treatment.

Kodak anticipated cash flow problems with ICN, and ICN would have to pay $3,000,000 in royalties to exercise its first right of refusal as to antivirals created by NARI, the only block to Kodak's second right.

As early as 1983, the Kodak vice president who joined ICN and Viratek in 1986 was told that the way to gain approval of ribavirin was for a company like Kodak to lend its reputation, credibility and money, to separate the

drug from ICN's lack of credibility. Another Kodak vice president estimated Kodak's investment would increase the value of the drug from 0 to $150,000,000.

Kodak press releases of April 25, 1985 and March 5 and October 2, 1986 touted the formation of the joint venture and Kodak's funding.

Ties not through NARI included agreement by Kodak in February, 1986, to fund trials of ribavirin in humans, with Kodak receiving royalties and marketing rights. Kodak officials per se communicated with the FDA about the sought after FDA approvals. Prior to a July, 1986 ICN underwriting, Kodak took brokerage officials on a tour of its ribavirin production facilities. Kodak officials in late 1985 discussed timing of buying ICN.

The following negative information,

which Kodak generated in dealing with ICN and affiliates, must be viewed in the context of the above strategies, and the trading patterns addressed below: (1) An independent consultant for Kodak told them the ribavirin labeling and claims go far beyond the approved language, and a note from one Kodak VP to another said if not stopped, the tie should be ended. (2) In August, 1986, Kodak determined to sell its ICN and Viratek holdings, and gave ICN a deadline to convince not to. (3) ICN was reminding Kodak of its close ties in the eyes of the public to ICN, and Kodak was saying each party should remind their shareholders of the limits on the connection. (4) Kodak did not sell then, but in October, 1986 paid ICN $1,000,000 "in return for making a $2,200,000 order for ribavirin produced for ICN by Kodak noncancellable." Kodak

also announced the funding of human trials to be conducted by ICN/Viratek (not NARI), agreed to in February. (5) Kodak requested better documentation of the claimed progress in trials in November, 1986, and ICN responded that Kodak was "too formalistic". (6) In February, 1987, Kodak returned a trials package, declining to fund any further trials, but claiming this was "not due to any pessimism about the product itself". (7) Kodak had studies by independent labs showing ICN's studies as to toxicity poorly analyzed or of borderline adequacy, and indicating moderate to high toxicity. (7) On March 3, 1987, Kodak again notified ICN of its intent to sell.

Kodak also learned: (1) In August, 1986 Paine Webber, one of the companies touring Kodak referenced above, issued a report that ribavirin "could become one

of the largest selling drugs in the world", that ICN is "positioned for enormous growth", and FDA approval of ribavirin for aids treatment could be expected as soon as next year. (compare time frame to Kodak's first decision to sell). As of these announcements, clinical tests as to aids were incomplete and not proving efficacy. (2) Panic had a long, documented history of feeding people whoppers to hype stock, and poor success in getting FDA approval for significant applications of ribavirin. (3) Paine Webber issued a September, 1986 report of much broader application of ribavirin. (4) ICN issued a September, 1986 report that ribavirin was safe, in the face of known ongoing toxicity complaints. (5) Panic held a press conference in January, 1987, touting the safety of ribavirin and its efficacy in preventing

transition from LAS to aids, even though ICN had just given the data to the FDA, which had requested that an announcement not occur, and the data had been withheld from verification by anyone else in the scientific community, and ICN's medical director had told the FDA no significant antiviral effect was seen. (6) The "supporting data" was not given to the FDA until a few days before the April 15, 1987 FDA announcement of nonapproval.

On March 23, 1987, ICN announced plans to buy back 14% of its common stock, which announcement was intended to offset a March 24 announcement by Kodak that it was selling its 2.3 ownership of ICN, with Kodak claiming that "The purpose of the investments had been to lay the groundwork for the creation of NARI. That has been achieved, so there's no longer any

strategic reason to maintain the equity position in ICN or the current level in Viratek." On March 25, ICN announced that Kodak had confirmed continuing confidence in NARI. Kodak unloaded all of its 470,000 shares of ICN stock at a profit of 4.1 million dollars, April 1-9, 1987. On April 15, ICN announced non approval by the FDA (which notified ICN officially April 13) of use of ribavirin for treatment of Aids.

Perry's broker in July, 1986, Paine Webber, got him interested in ICN and Viratek, and he began trading in them, with aggressive marketing by Paine Webber. He bought and sold, relying on the market mix of information, and as of the end of February, 1987, held 30,000 shares of ICN and 4,500 of Viratek.
He bought 1000 additional shares of Viratek with ICN's March 23, 1987 announcement. 4,500 shares of Perry's

ICN stock was sold by his broker April 9, 1987, after a decline in market value.

The entire balance of Perry's ICN and Viratek shares were sold to meet margin calls April 15, 1987, in reaction to major price drops after the non approval announcement. Perry's losses as of April 15 totalled approximately $141,000 in ICN and $178,000 in Viratek.

Perry's suit as to all defendants, (with jurisdiction in the federal district court based on 28 U.S. Code Sec. 1331, 1332, and 1337) was transferred to the Southern District of New York. Judge McKinney dismissed the complaint as to Kodak, and allowed a few weeks for "limited, expedited discovery", with a short period to file an amended complaint after that. After about a year, he dismissed the Amended Complaint with prejudice (Exhibit to the ruling of the 7th Circuit.)

## ARGUMENT

### A. INVOLUNTARY LOSSES.

Possibly the strongest aspect of Perry's case is the unloading by Kodak, which was armed with enormous amounts of inside information and strong inside or tippee status, just before the bottom fell out, and at a comfortable profit, while fellow shareholders then faced disaster. The Trial Court found, and the 7th Circuit did not dispute, that Perry cannot recover, because the margin calls which wiped out his positions would have occured regardless, and therefor Kodak's trading, statements or omissions were not a cause of Perry's losses. With the possession of extensive sensitive information presenting a fact issue as to fiduciary duty, and probably showing its presence, it fails the purpose of the act to not require Kodak to disgorge.

The insider or tippee trading virtually never causes the bad or good event, but characteristically evades or cashes in on its effects. That is, trading at an unfair advantage. See Fogarty, "Bases of Insider Trading Law", 49 Ohio St L.J. 353 (1988). It would be supercilious to make inside trading actionable, only in the presence of manipulation. They are two different things. Once that distinction is recognized, whether the fellow shareholders who were left holding the bag faced involuntary sale is immaterial. They are entitled to require the insider or tippee to disgorge, up to their losses. See Loss, Louis, Fundamentals of Securities Regulation, 1988, 1991 suppl, p 270, citing Basic, Inc. vs. Levinson, 485 U.S. 224, 241-249 (1988) and Affiliated Ute Citizens vs. U.S., 406 U.S. at 153-

154, as to the presumption of reliance where material information was not disclosed, and professor Loss' references to common sense and probability. Of particular note is his cite at page 273 of the supplement to Frankel vs. Wyllie & Thornhill, Inc., 537 F. Supp. 730, 736--"In this situation the plaintiff need not prove reliance, since his action was not voluntary".

The insider is a person under a roof with his fellow building owners. If he sees that the roof is about to cave in, he might minimize his own injury in the anticipated stampede, by easing out before saying anything. He can't do that. If he does, and hauls loot for himself in the process, he forks over the loot. His relationship as a co owner, combined with his inside information, establishes a fiduciary

duty to yell "Lookout!" before or as he begins to run. Kodak said, "Oh, I'm just tired of the building", and eased out, slipping vases into its coat on the way. The fact a particular person's leg might have been crushed anyway, if he had not reacted quickly enough, is beside the point. Even if the improvement of position possible with knowledge was small, the gains of the inside person should still be disgorged. It is incumbent upon the defendant to segregate the intervening or other factors. Loss, supra, supplement, p 277, suppl to p 964, n.155. See also supplement page 276, to page 967 n. 164, re the drop as a good measure of the value of the information. See also similar concepts in the Janigan defrauded seller doctrine, on the same page, and in the Janigan paragraph, the inference that damages equal profits realized by the defendant on resale.

## B. OPPOSITE SIDE.

The purpose of the Act is to provide remedy for fraud, essentially adopting common law concepts. Nothing in the common law definition of fraud requires a "relationship" between the perpetrator and victim, other than the sending of signals (or in the presence of a fiduciary relationship, failure to send signals in the presence of a duty to do so.) If A makes a false representation of material fact in a public disclosure, intending fellw shareholder B and potential buyer C to rely on it, and they do so, and are damaged, fraud is present, not just as to C, but also as to B. The fact A was trying to beat fellow shareholder B to the punch, by selling to C before B was aware of the facts, meets the elements as to B. The fact A was not trying to sell to B is of no consequence. The

fact A actually traded with C adds dramatic impact as to C, but is irrelevant to the legal elements of common law fraud. Any other view is an illfounded judicial construction, designed to insulate perpetrators from application of straight forward traditional fraud concepts. Thus, the fraud on the market concept is not a mere babe (dissent in Basic, supra), but a return to black letter common law fraud.

The Trial Court found that giving a bland and essentially false "reason" for selling, as occurred here, was not affirmative misrepresentation, in the securities context! See Loss, supplement, supra, notes to p 722, n95, to p 737, n 55, and to p 963, n 145. Even if that were true, the fiduciary relationship established a duty as an insider or tippee, to disclose material

information not disclosed.

C. CONTEMPORANEOUS.

The Trial Court, and apparently the 7th Circuit, have ignored the time frame in Basic vs.Levinson. It is dogmatic and unrealistic to limit time frames to a few weeks. Characteristically, these traps are laid or activity patterns extended over periods of months and years, and to hold the parties to very short time frames as a matter of law, opens the barn door for perpetrators with even a modicum of finesse.

Here, Kodak specifically set out to build in the public eyes, with its own involvement, the credibility of a company viewed by Kodak as having none. Kodak established positions in the securities, obtained enormous amounts of highly sensitive information in throwing in its lot with ICN, et al,

started to pull out twice and stayed in for other business reasons, and a few weeks before enormously bad news, pulled out at a profit. It is not reasonable to decree as a matter of law, that Kodak's nondisclosure of the serious misgivings early on were not part of the market mix which induced Perry's purchases around the same time. If Kodak had disclosed that they were trying to get away from ICN because of the lack of scientific credibility, would Perry have invested? Especially if Kodak's view of its own credibility was accurate? See reference in Basic, supra to a crooked crap game.

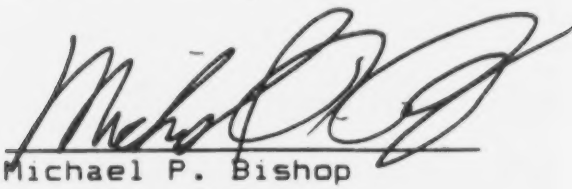
The emphasis in "contemporaneous" should be probable impact, rather than calendar time. In addition to the long time frame in Basic, supra, see note to p 737, end carryover par. in Loss, suppl, supra.

## D. ORIENTATION TO RULE 10

This Court made clear in Basic, supra, that the fraud on the market concept pointed toward a more common sense view, more faithful to common law tort concepts and the impersonal nature of the securities market. Especially as to the issues in A, B and C above, and as to "loss and transaction" causation and reliance, it will help the markets to clarify further the import of Basic. And especially considering the recent blows to investors in reversing prior court precedent as to enforceability of arbitration clauses, and limitation of actions, it would be appropriate for the Court to eliminate or put into perspective constructs, which block unreasonably the rights of investors to seek relief.

As to the case at hand, the inference is the strongest with respect to insider or tippee trading.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Ill 60604

Argued February 13, 1992

May 15, 1992

Before

Hon JOHN L COFFEY, Circuit Judge
Hon JOEL L FLAUM, Circuit Judge
Hon JESSE E ESCHBACH, Senior Judge

D. C. PERRY,

Plaintiff/Appellant,

vs.

EASTMAN KODAK COMPANY,

Defendant/Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 91-2192
87 C 1023
Larry J McKinney, Judge

ORDER

In 1986 and 1987, the plaintiff, D.C. Perry, invested in two companies that were attempting to market a drug known as ribavirin as an approved treatment for the AIDS virus. After Perry lost money on his

investments, he filed suit against various entities, alleging numerous securities violations. Most of these claims have been transferred to the Southern District of New York, but the claim against Eastman Kodak was handled in the Southern District of Indiana. The district court granted Eastman Kodak's motion to dismiss under Fed. R. Civ. P. 12(b)(6). The district court order is attached as appendix A to this order, and we AFFIRM that order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

D.C. PERRY, )
Plaintiff, )
)
vs. )CAUSE NO. IP-871023-C
)
)
EASTMAN KODAK CO., )
)
Defendant. )

ORDER ON KODAK'S MOTION TO DISMISS

This cause comes before the Court on the defendant's motion to dismiss for failure to state a claim upon which relief can be granted.[1] For the reasons set forth below, the Court GRANTS the motion to dismiss.

[1]In ruling on a 12(b) (6) motion, this Court must accept the well-pleaded allegations of the complaint as true, and must view these allegations in the light most favorable to the plaintiff. Gomez v. Illinois State Board of Education, 811 F.2d 1030, 1039 (7th Cir. 1987).

## I. Background

Plaintiff Perry is an individual who purchased and sold significant quantities of ICN Pharmaceuticals and Viratek stock in 1986 and 1987. At the time of his investments, Virazole was denied approval by the FDA for use in the treatment of AIDS which resulted in a substantial drop in the value of the stocks of ICN and Viratek. After losing money in these stock transactions, Perry filed the present action against a number of defendants, including ICN, Viratek, and the stock brokerage firms with whom he dealt. The claims against these defendants have been transferred by this Court to the Southern District of New York.

The only remaining claim before this

Court is against Eastman Kodak. On July 27, 1989, this Court dismissed Counts Two, Four, Five, Six and Seven of the original complaint and granted the plaintiff leave to amend Counts One and Three as to Eastman Kodak. The Court found that the plaintiff's complaint on these counts were not stated with sufficient particularity and permitted limited expedited discovery to enable the plaintiff to amend these claims.

The plaintiff has filed his amended complaint which consists of three counts. In Count I, Perry alleges that Kodak violated Sections 10(b) and 9 of the Securities Exchange Act of 1934. 15 U.S.C. Sec. 78j(b) and 78i. In Count II, Perry alleges that Kodak violated Section 23-2-1-12 of the Indiana Securities Act. In Count III, Perry alleges that Kodak

committed common law fraud. Kodak filed a motion to dismiss, pursuant to Fed. R. Civ. P. 12(b) (6), for failure to state a claim upon which relief can be granted in response to the amended complaint.

The amended complaint consists of numerous contentions and allegations. The central allegations are as follows:

1. Beginning in July, 1986, Perry purchased stock in ICN Pharmaceuticals, Inc., and its subsidiary, Viratek, Inc., and by the end of February, 1987, Perry held 30,000 shares of ICN stock and 4,500 shares of Viratek stock.
2. On March 23, 1987, ICN announced its plans to buy back up to three million shares of its outstanding stock, and Perry purchased an additional 1,000 shares of Viratek

stock.

3. On March 24, 1987, Kodak announced its intention to sell all of its ICN stock allegedly stating that its reason for selling was its objectives had been met.

4. On March 25, 1987, ICN announced that Kodak had confirmed continuing confidence in the progress of a joint research venture with ICN, the Nucleic Acid Research Institute ("NARI") and that ICN and Kodak were discussing a private sale of stock to ICN.

5. Beginning on April 1, 1987, and through April 9, 1987, Kodak sold all of its ICN shares.

6. On April 9, 1987, in response to declines in the market value of ICN stock, Perry's broker sold 4,500

shares of Perry's ICN stock.

7. On April 15, 1987, ICN announced that the FDA had decided not to approve ICN's product, ribavirin, for use in treatment of the AIDS virus. Consequently, the market price of ICN and Viratek stock dropped significantly. The balance of Perry's Viratek and ICN stock was sold by his broker in a margin call that same day.

8. Beginning in late May, and through early June, 1987, Kodak sold all of its Viratek stock.

9. Perry also alleges that during this time: Kodak was a partner with ICN in a joint research program, NARI; in early 1986, Kodak agreed to fund the first phase of AIDS human clinical trials conducted by ICN;

from 1984 through 1987, Kodak manufactured ribavirin for sale to ICN; and that as a result of these relationships Kodak had or may have had material non-public information regarding ICN, Viratek or ribavirin.

Perry claims that these allegations support valid claims under Sections 10(b) and 9 of the 1934 Act. First, Perry alleges that Kodak's March 24 press release was a false or misleading statement in violation of 10(b). Second, Perry claims that Kodak aided and abetted primary securities violations by ICN, Viratek, and others. Perry claims that Kodak substantially assisted these parties by lending its reputation and financial support to NARI and ICN's AIDS trials and by failing to disclose primary violations that it must

have known about. Third, Perry alleges that Kodak's sales of ICN and Viratek stock constitute insider trading, because Kodak was either and (sic) "insider" or "tippee" and must have had material non-public information regarding ICN and ribavirin. Finally, Perry alleges that Kodak's March 24 statement violates Section 9 of the 1934 Act, because it was part of efforts to manipulate upwards the market price of ICN and Viratek stock. Perry also claims that these same allegations support his Count II Indiana blue sky claim and his Count III common law fraud claim. The Court will discuss each of these counts separately.

## II. Count I: Federal Claims

### A. The Section 10(b) False Statement Claim

To recover under a Sec. 10(b) or

Rule 10b-5 cause of action, a plaintiff must first prove that the defendant violated the statute or the rule. To do so, a plaintiff must establish the following:

(1) that defendants intentionally or recklessly;

(2) misrepresented, or omitted to disclose despite a duty to disclose;

(3) material facts;

(4) in connection with the purchase or sale of a security.

Bastian v. Petren Resources Corp., 681 F. Supp. 530, 533 (N.D. Ill. 1988). Perry must then establish that the alleged violation was the direct and proximate cause of his securities transactions and the losses he allegedly suffered. This requires allegations that show (1) justifiable reliance on deceptive

statements which result in an investment decision; and (2) a causal connection between the statements and Perry's economic loss. LHLC Corp. v. Cluett, Peabody & Co., 842 F.2d 928, 931-32 (7th Cir. 1988), cert. denied, 488 U.S. 926 (1988).

"Reliance is an element of a Rule 10b-5 cause of action. Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." Basic Inc. v. Levinson, 485 U.S. 224, 243 (1987). The problem in this cause is that Perry has not alleged any direct reliance on Kodak's press release in making any of his stock transactions. All of his stock purchases occurred prior to the release. All of his sales were involuntary margin calls to cover declines in the market

price of ICN and Viratek stock. Perry has alleged no direct connection between his purchases and sales and Kodak's statement.

Instead, Perry indicates that his reliance was based on the integrity of the market-price of the stocks. The basis for this belief comes from the fraud-on-the-market theory recognized by the U.S. Supreme Court in Basic Inc. v. Levinson. Fraud-on-the-market is a theory which recognizes that a materially false statement or omission may be relied upon in the process of valuing shares. The false statement or omission causes the price of the stock to deviate from what its intrinsic value should be. As a result, investors could be hurt by false statements even if they do not rely upon the actual false statements or omissions.

The fraud-on-the-market theory replaces the reliance on a misleading statement with reliance on the integrity of the market-price of the stock. Therefore, Perry must allege reliance on the market-price when either making a purchase or a sale of a stock. As stated before, all purchases were made prior to any possible misleading statement by Kodak. As a result, the alleged misleading statement could not have affected the integrity of the market-price of the stocks at the time Perry purchased them.

Regarding the sale of the stocks, Perry alleges that the stocks were sold because of significant declines in ICN's and Viratek's market prices. Perry also alleges that Kodak attempted to artificially raise the market price of

these stocks through its misrepresentations. The only possible way in which Perry could have relied to his detriment on an artificially raised or maintained market-price would have been to continue holding his stock when he could have sold at the higher price if he had known all the facts.

Such a reliance is barred by the adoption of the Birnbaum rule in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). "Three principal classes of potential plaintiffs are presently barred by the Birnbaum rule . . [including] actual shareholders in the issuer who allege that they decided not to sell their shares because of an unduly rosy representation or a failure to disclose unfavorable material." Blue Chip Stamps, at 737-738. A plaintiff

simply has no claim for sales that he or she would have made but for a misrepresentation or omission.

Perry claims that the Birnbaum rule does not apply in this case because he sold his stocks. Nowhere does Perry allege that these sales were in connection with Kodak's statements but rather Perry argues that if he had known what Kodak allegedly knew, he would have sold somewhat sooner at a more favorable price. This is the type of claim that is expressly barred by the Birnbaum rule. As a result, Perry has not shown a justifiable reliance on Kodak's statement through either direct reliance or through the fraud-on-the-market theory, and therefore Perry's Section 10(b) false statement claim must fail.

An independent ground for the same

result is that there is no causal connection between Kodak's statements and Perry's economic loss. "What securities lawyers call 'loss causation' is the standard common law fraud rule, merely borrowed for use in federal securities fraud cases. It is more fundamental still; it is an instance of the common law's universal requirement that the tort plaintiff prove causation." Bastian v. Petren Resources Corp., 892 F.2d 680, 683-84 (7th Cir. 1990).

Perry's loss came from a sudden decline in the value of his ICN and Viratek stock. In order to show loss causation, Perry must be able to show that Kodak's statement that it intended to sell its ICN and Viratek stock caused the declines in price. It is beyond dispute that the FDA's rejection of

ribavirin for use in AIDS treatment was the primary reason behind the decline in the stock prices not Kodak's statement.

Perry apparently argues that if Kodak had not made an allegedly misleading statement but publicly disclosed the information supposedly known by Kodak that ribavirin would not be approved by the FDA, Perry could have sold his stock before the market-price dropped. This argument is contrived and ignores the market reality that if such information existed and was disclosed, it would simply mean that the stock prices would have dropped that much sooner. But such speculation aside, Perry has failed to show that Kodak's statement caused his economic loss in any way.

Thus, Perry cannot show justifiable reliance on Kodak's statement or a causal

connection between the statement and Perry's economic loss, Perry's Section 10(b) false statement claim must be dismissed for failure to state a claim upon which relief can be granted.

B. The Section 10(b) Aiding and Abetting Claim

Perry claims that Kodak aided and abetted primary securities violations by ICN, Viratek, SPI Pharmaceuticals, Inc., and Milan Panic (the ICN Parties). Perry claims that Kodak substantially assisted these parties by lending its reputation and financial support to NARI and ICN's AIDS trials and by failing to disclose primary violations of which it must have known. To state a claim for "aiding and abetting" a securities violator, the plaintiff must allege:

1. the existence of a primary violator;

2. that the aider and abetter acted with the same mental state as required for primary liability;
3. that the aider and abetter substantially assisted the violation; and
4. that the assistance was a substantial factor in causing the resulting harm.

Board of Trustees of the Firefighters Pension Fund v. Liberty Group, 708 F. Supp. 1504, 1506 (N.D. Ill. 1989).

Perry's Amended Complaint does not identify with any particularity the primary violations on which Perry's aiding and abetting claims are supposedly based. The only acts by ICN parties alleged in the Amended Complaint occurring after November 28, 1986 (the date upon which Kodak's aiding and

abetting liability is alleged to arise), are statements or announcements by ICN. These allegations fail to state any aiding and abetting claims against Kodak.

Aiding and abetting liability under Section 10(b) is premised on a showing that a defendant deliberately helped someone violate the securities laws with (1) knowledge that the violations occurred and (2) knowledge of one's own role in a scheme to carry out those violations. Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 495-96 (7th Cir. 1986); Woods v. Barnett Bank of Fort Lauderdale, 765 F.2d 1004, 1010 (11th Cir. 1985). Perry has failed to allege any direct security violations by anyone. This deficiency makes it difficult to find that Kodak had knowledge that a violation occurred, much

less that it had knowledge of its role in a scheme to carry out such violation.

A second possibility for aiding and abetting liability would be if Kodak remained silent in the face of security violations of which it knew. Aiding and abetting liability based on a failure to disclose knowledge of a primary securities violation is only actionable when the defendant has a duty to disclose stemming from a fiduciary relationship outside the securities laws. Schlifke v. Seafirst Corp., 866 F.2d 935, 948 (7th Cir. 1989); Barker, 797 F.2d at 496. Perry has completely failed to allege any facts that would indicate that Kodak had any duty to speak concerning any possible securities violations of which it was aware. No facts have been alleged which would indicate a fiduciary relationship

between Kodak and Perry. Perry has failed to indicate any basis on which Kodak could be found liable on an aiding and abetting claim. Therefore, Perry's aiding and abetting claim against Kodak must be dismissed.

C. The Section 10(b) Insider Trading Claim

Perry claims that Kodak's sales of ICN stock and Viratek stock constitute illegal insider trading in violation of Section 10(b), because Kodak, as either an "insider" or "tippee," must have known material, non-public information regarding ICN, Viratek or ribavirin. No cause of action arises under section 10(b) or rule 10b-5 simply because an insider has inside information and fails to disclose it. The duty arises only where there is a breach of the rule that

an insider must "disclose or abstain" from trading. Laventhall v. General Dynamics Corp., 704 F.2d 407, 412 (8th Cir.), cert. denied, 464 U.S. 846 (1983); Fridrich v. Bradford, 542 F.2d 307, 318 (6th Cir. 1976), cert. denied, 429 U.S. 1053 (1977). the "abstain or disclose" rule was developed in SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

The "abstain or disclose" rule holds that "anyone in possession of material inside information must either disclose it to the investing public or, if he is disabled from disclosing it . . ., or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains disclosed." (sic) Id. at 848. The justification of the rule is that if the

insider trades on the basis of the inside information he may profit at the expense of outside investors who are disadvantaged in the same or similar transaction by lack of inside information. "Any duty of disclosure is owed only to those investors trading contemporaneously with the insider; non-contemporaneous traders do not require the protection of the disclose or abstain rule because they do not suffer the disadvantage of trading with someone who has superior access to information." Wilson v. Comtech Telecommunications Corp., 648 F.2d 88, 94-95 (2nd Cir. 1981).

In this situation, Kodak purchased its shares of ICN and Viratek in July, 1984. Perry did not make his first purchase of these stocks until July,

1986. All of his ICN purchases were made by the end of February, 1987 and his last Viratek purchase was made on March 23, 1987. Kodak sold its ICN stock from April 1 through April 9, 1987. On April 9, 1987, Perry's broker sold 4,500 shares of Perry's ICN stock. The balance of Perry's Viratek and ICN stock was sold on April 15, 1987. Kodak sold all of its Viratek stock in May and June of 1987. The only contemporaneous trading between Kodak and Perry involved the sales of ICN stock on April 9, 1987. Perry could not have suffered a disadvantage because of the alleged inside information since it made the same transaction as Kodak. Perry could only have been damaged from the withholding of any inside information if he had been on the opposite side of the transaction.

The "disclose or abstain" rule is intended to prevent one party from using its knowledge to gain an advantage over others trading in the same market at the same time. This Court does not believe that one party has gained an advantage over another party making the same transaction in the same market at the same time just because the first party has inside information concerning the transaction. Kodak only owes a duty to investors trading contemporaneously with it. Perry cannot show that it was damaged by the use of any alleged inside information by Kodak in any contemporaneous tradings with Kodak. Therefore, Perry's Section 10(b) insider trading claim must be dismissed.

D. The Section 9 Price Manipulation Claim

Perry's last federal claim is that Kodak allegedly violated Section 9 of the 1934 Act, because its March 24 press release, in tandem with ICN's press releases, gave the false impression of actual or apparent securities transactions and were designed to raise the prices of ICN and Viratek stock. Perry claims that this conduct violated Section 9(a) (2) by giving a false impression of trading, and Section 9(a) (4) because it involved false statements.

Regarding Perry's trades in Viratek stock, these transactions are clearly beyond the scope of Section 9. Viratek is traded in the over-the-counter market. Section 9 is expressly limited to securities traded on one of the national

stock exchanges. 15 U.S.C. Sec. 78i(a). Perry's Section 9 are very similar to those for Section 10(b) actions. In order to show a violation of Section 9(a) and recover damages under Section 9(e), a private plaintiff must plead and prove that:

(1) a series of transactions in a security created actual or apparent trading in that security or raised or depressed the market price of that security;

(2) the transactions were carried out with scienter;

(3) for the purpose of inducing the security's sale or purchase by others;

(4) were relied on by the plaintiff; and

(5) affected plaintiff's purchase or selling price.

Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1164 (5th Cir. 1982), vacated on other grounds, 460 U.S. 1007 (1983). Perry's Section 9 claim suffers from the same causation and reliance problems that required dismissal of his Section 10(b) claims. Perry has not alleged any actual reliance on a manipulated market price. As a result, his Section 9 claim must be dismissed.

II. Indiana Blue Sky Claim

For Count II of his Amended Complaint, Perry incorporates precisely the same allegations that underlie his Section 10(b) claims. Perry claims that these allegations demonstrate that Kodak violated Section 23-2-1-12 of the Indiana Securities Act and that he is entitled to

rescission or recovery of the consideration he paid for ICN or Viratek stock under Section 23-2-1-19. Violations of Section 23-2-1-12 carry the same reliance, causation and duty to disclose requirements as its federal counterpart, Rule 10b-5. Thus, Perry's claim cannot satisfy these elements for the reasons previously discussed.

In addition, the Indiana Act expressly limits a defendant's liability for any securities transaction that violates Section 23-2-1-12 "to any other party to the transaction." Ind. Code Sec. 23-2-1-19(a) and (b). Kodak did not buy from or sell to Perry any of the stock on which he bases his claim. Since Perry has alleged no securities transactions in which Kodak and Perry both participated, Perry has no claim for

relief under the Indiana Securities Act. Therefore, for each of these reasons, Perry's Indiana Blue Sky claim must be dismissed.

III. Count III: Common Law Fraud Claim

Count III of Perry's Amended Complaint alleges that Kodak's statement in its March 24, 1987 press release constitutes common law fraud under Indiana law. This is the exact same fraud claim that the Court dismissed in its order of July 27, 1989. The Court held that this sort of generalized representation is not actionable in Indiana because Indiana law requires a misrepresentation of an actual past or present fact, and expressions of opinion and announcements of future intention are not enough. The Court can find no basis in Perry's Amended Complaint which would

convince the Court that its prior dismissal of the common law fraud was incorrect. Thus, Court III of Perry's Amended Complaint must be dismissed.

IV. Conclusion

For the reasons previously set forth, the Court hereby ORDERS that this action be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b) (6) for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED this _____ day of April, 1991.

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

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15 U.S. Code Sec. 78i. Manipulation of security prices.

Transactions relating to purchase or sale of security.

(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange--

...(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce

the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the prices of such security.

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false

or misleading.

...(e) Any person who willfully participates in any act or transaction in violation of subsections (a),(b) or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction....

15 U.S. Code Sec. 78j. Manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

...(b) To use or employ, in connection with the purchase or sale of any security

registered on a national securites exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.